No. 86-746

In The

Supreme Court of the United States

October Term 1986

SHARE, et al.,

Petitioners,

v.

STACIE BERING, M.D., et al.,

Respondents.

On Petition for a Writ of Certiorari
to the Supreme Court of the State of Washington

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

A state trial court enjoined individuals demonstrating in front of a nine-story medical building from picketing along a limited portion of public sidewalk adjacent to the facility's single public entrance. The injunction also prohibited the oral use, at the picket site, of specified phrases regarding the murdering or killing of children by doctors in the building. The Supreme Court of Washington upheld the place restriction but remanded the content restriction due to its overbreadth.

Respondents challenge the questions as formulated by petitioners. The questions presented should be:

1. Whether an injunction is overbroad for setting a limited place restriction on individuals whose conduct was found to have obstructed access to a multi-purpose medical building in a manner inimical to privacy, dangerous to health, and incompatible with the normal activity of the facility?

2. Whether a content restriction prohibiting the continued use of specific oral epithets, found to cause physical and psychological harm to children when uttered in face-to-face confrontations at the portal to private medical offices, is reviewable for overbreadth where the state's highest court has permanently stayed enforcement and remanded the issue to narrow the injunction?

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The respondents, pediatrician Michael McCarthy, obstetrician-gynecologists Pam Silverstein and Stacie Bering, and medical building owner Howard Johnson, respectfully request that this Court deny the petition for writ of certiorari seeking review of the Washington State Supreme Court's opinion entered in this proceeding on June 19, 1986. That

opinion is reported at 106 Wash. 2d 212, 721 P.2d 918 (1986).

STATEMENT OF THE CASE

The respondents concur in the docketed Statement of the Case (Pet. 4-6) subject to the addition of the following items not included in the petitioners' statement:

(1) The state's high court upheld the finding that the picketers' conduct "created a substantial risk of physical and mental harm, and 'counseling' had been forced upon persons attempting to enter or leave the premises." (Pet. 7a).[1]

(2) The state's high court upheld the finding that the picketers' conduct "in instances gave rise to a clear and present danger to patients." (Pet. at 7a).

(3) The state's high court upheld the finding that "picketing had been conducted in a manner incompatible with the character and function of the Medical Building." (Pet. at 7a).

The Washington State Supreme Court upheld the trial court's finding, based upon the evidence admitted during a day-long hearing on the permanent injunction including numerous affidavits, eyewitness testimony, and over 100

[1]Citations to the opinion of the Washington State Supreme Court refer to the Appendix attached to this proceeding's Petition for Writ of Certiorari. Pet. 1-99a.

photographs. (Pet. at 11a). The evidence showed that picketers grabbed patients and staff; patrolled and blocked the public sidewalk and the single public entrance at the nine-story multi-purpose medical building; threatened and screamed at patients; interfered with parents bringing children to respondent Michael McCarthy, a pediatric respiratory allergist; entered physicians' offices to advocate their political views; interfered with patients in advanced stages of pregnancy, including one suspected toxemic in acute medical danger; and blocked a patient miscarrying a wanted pregnancy so that she had to force her way through picketers on a snow covered sidewalk in order to reach her nurse and wheelchair. (Pet. at 4-6a).

The trial court also held contempt hearings several weeks following the entry of the permanent injunction. Six individuals were found to be in contempt, some for multiple violations of the court's order. All the contempt adjudications concerned intentional violations of the place restrictions.[2] (Pet. at 8-9a, 64a).

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[2] As argued in Part II, below, the fact that no contempt adjudications arose from the content restriction is material to this Court's exercise of jurisdiction under 28 U.S.C. § 1257. Pet. 64a.

On review the Washington State Supreme Court upheld the place restriction against claims that the prohibition violated federal[3] and state[4] constitutional provisions.

The high court further held that the content restriction, while not a classic prior restraint, was overbroad in application. (Pet. 55a). The court stayed enforcement of the content restriction[5] and remanded this portion of the decision for further hearings at the trial court level to set guidelines and narrow the prohibition. (Pet. 56a, 61a, 63a).

REASONS WHY THE PETITION SHOULD BE DENIED

Respondents oppose the petition for writ of certiorari on the grounds that (1) the decision below upholds the place restriction in scrupulous accord with traditional federal standards regarding speech restrictions, and (2) the content restriction does not present a final judgment susceptible to review.

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[3] Pet. 11-36a (First Amendment, speech clause).

[4] Pet. 36-40a (Wash. Const., art 1 § 5) ("Every person may freely speak, write and publish on all subjects, being responsible for the abuse of that right").

[5] As the court noted, the enforcement of the injunction through contempt proceedings was valid only where picketers intentionally violated the upheld place restrictions. Pet. 64a. The court considered the remanded content restriction unenforceable in its present form.

I. The place restrictions upheld below strictly follow this Court's established time, place, and manner analysis.

Contrary to petitioners' assertions, the decision below does not represent a break from the traditional framework mandated by this Court in adjudicating reasonable time, place, or manner restrictions on expression. The decision analyzed the unique facts and circumstances presented to the trial court and determined that the place restriction was content neutral, narrowly tailored to serve two significant government interests, and fashioned to allow ample alternative channels of expression within a section of the original[6] picket site itself. *Compare*, *Grayned v. City of Rockford*, 408 U.S. 104, 115-17 (1972); *and see generally*, Pet 11-40a.

To advance their overbreadth argument before this Court, petitioners understandably characterize the injunction as having broad application. Thus the petition states in its first Question Presented that the injunction prohibits "all persons" from engaging in expressive conduct in front of the medical

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[6] The characterization that picketers were moved "down the street and around the corner" is grossly misleading. (Pet. 12). The injunction moved picketers away from the portion of sidewalk bordering the narrow pathway to the single public entrance (see diagram, Pet. 2a), but allowed picketing adjacent to the building, in full view of all who entered the facility and alongside the four lane thoroughfare (Pet. 35-36a) where picketers had been patrolling for months prior to the injunction.

building. Pet. at 3. Nevertheless, the decision and record below in no way support such an interpretation.[7] The injunction is quite properly restricted to those individuals acting in concert with the named parties who had engaged in activity found to be dangerous to patients and incompatible with the health care function of the medical building. Further, the decision specifically rejects any notion that individuals other than parties to the cause should come under the place restriction. Applying the restriction to "all picketers of any persuasion, regardless of their conduct, would have been overly broad." (Pet. 16a).

Mischaracterizing the record and decision below in order to cause the injunction to appear broader cannot qualify the petition as worthy of review by this Court. Sup. Ct. R. 19.5.

The petition also fails to accurately characterize the state supreme court's identification of the compelling state interests served by the injunction. The court identified two compelling state interests: unfettered access to health facilities

[7] Apparently petitioners recognize this fact; the petition later states that the injunction impermissibly singles out only abortion protesters. (Pet. 8). The response to petitioners' overstatement in the first Question Presented serves equally to address the objection that the place restrition is content-sensitive: "[t]he trial court imposed the place restriction in order to regulate the *conduct* of a *particular group of people before the court*.". (Pet. 16a) (emphasis added).

by all individuals, and the privacy right existing between women and their physicians concerning reproductive issues. (Pet. 20-21a). Petitioners state that the court's power to enjoin speech activities along 6th Avenue should have been limited to restrictions on aggressive, disorderly, or coercive conduct. (Pet. 7). The assertion ignores the high court's finding that, under the unique circumstances of the case,[8] the presence of the particular gathering of picketers by the one public entrance was itself sufficiently threatening to warrant the limited place restriction. (Pet. 34a). The assertion also ignores the court's concern that the injunction provide relief beyond solely abstract restrictions or semantic protections: the court specifically fashioned a bright line demarcation so as to be enforceable on a practical basis. (Pet. 34a). These considerations are highly individualized and fact-bound, making the decision a poor candidate for review.

Finally, petitioners predict that dire consequences will flow from the place restriction. They warn that the privacy claim, if left in place, raises the possibility that others engaging in private activities, such as voting, will seek special place

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[8] Including such diverse factors as the recent violent attacks and bombings at other medical facilities in the state (Pet. 28a), the ice and snow conditions prevalent on sidewalks in northeastern Washington State (Pet. 5a), and the privacy rights existing between women and their physicians in reproductive matters.

restrictions on speech and expression aimed at influencing private decisions. (Pet. 11). In fact, special place restrictions have existed to protect the voting public for many years. *State v. Black*, 54 NJL 446, 24 A. 489, aff'd, 65 NJL 688, 51 A. 1109 (1892) (election day ban on electioneering within 100 feet of polls); *and see, e.g., Piper v. Swan*, 319 F.Supp. 908, 911 (E.D. Tenn. 1970) (100-foot ban valid to protect against "last chance" efforts to change voters' decisions).

The decision in *Clean-Up '84 v. Heinrich*, 759 F.2d 1511 (11th Cir. 1985) overturning a 100-foot limit at a polling site in no way conflicts with the decision below. In *Clean-Up '84*, the court held that the ban was overbroad because it could be read to prohibit electioneering in a hypothetical private home situated within 100 feet of a polling place. The place restriction prohibiting respondents from picketing along the portion of 6th Avenue fronting the medical building is not similarly flawed. Nor does the decision below involve a total prohibition on written expression such as the election-day newspaper editorial ban overturned in *Mills v. Alabama*, 384 U.S. 216 (1966). Writing for the majority, Justice Black noted that the decision in *Mills* "in no way involves the extent of a

state's power to regulate conduct in and around the polls in order to maintain peace, order, and decorum there."[9]

Thus, courts have long recognized the validity of place restrictions used to protect significant privacy rights from even peaceful, non-governmental disruptions.

The high court's adherence to traditional time, place, and manner analysis, and the petitioners' failure to identify any conflict between the place restriction and federal law demonstrate that Question 1, however phrased, is not worthy of review.

II. The state high court stayed and remanded the content restrictions for further hearings; thus, the decision is not final judgment under 28 U.S.C. § 1257.

In accordance with 28 U.S.C. § 1257, this Court's jurisdiction on certiorari is limited to final judgments. *California Bankers Association v. Schultz*, 416 U.S. 21 (1974); *Wheeler v. Barrera*, 417 U.S. 402 (1974). Thus, where the decision below contemplates further proceedings, jurisdiction does not normally attach. *Uphaus v. Wyman*, 360 U.S. 72 (1959). In the First Amendment context, the Court makes exceptions to the general rule above where the remand

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[9] 384 U.S. at 218.

essentially contemplates only ministerial acts, the facts are not likely to be resolved differently after rehearing, and the contested provisions have substantially affected speech rights. *Organization for a Better Austin v. Keefe*, 402 U.S. 415, n.1 at 418 (1970); *and see*, *Food Employees v. Logan Valley*, 391 U.S. 308, n.5 at 312 (1967).

In sharp contrast to the traditional body of cases where jurisdiction was reached for formal or policy reasons, the decision below has none of the established characteristics of finality. *Compare*, *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 479-85 (1975).

Petitioners are not now subject to a content restriction. Unlike the parties in *Organization for a Better Austin* , petitioners here are not burdened by any injunction, permanent or temporary, affecting the content of speech. No picketers have been charged with contempt for prior violation of the content portion, and the decision below permanently stayed enforcement pending remand. (Pet. 64; and see note 5, above).

The outcome of the hearing is not preordained. Unlike the proceedings ordered in *Mills v. Alabama*, 384 U.S. at 217-18, the proceedings ordered below are intended to establish procedures and guidelines to be used in determining the

application of the content restriction. This hearing may result in a finding that the age limits are inappropriate, that the restriction is no longer necessary, or, as suggested in the dissent below (Pet. 85a), that the determination of guidelines is impossible.

Federal rights will not be harmed by allowing the trial court to proceed subject to review and final judgment by the Washington State Supreme Court. Any determination regarding nature and terms of the injunction will be reviewable on First Amendment grounds. *Compare*, *Cox Broadcasting*, 420 U.S. at 480-81. The petitioners' overbreadth issue will then be ripe if they wish to seek review.

Denying certiorari on finality grounds is especially appropriate in view of the circumstances underlying the second Question Presented. Petitioners challenge the content restriction for overbreadth: yet the court below *agreed* that the content restriction was overbroad; respondents' counsel *conceded* the point in their Brief in Response to Amici and during oral argument before the state's supreme court.

As a practical matter, the issue is not ripe. The court below has requested guidelines and a narrowed restriction. The parties have not had an opportunity to develop the record regarding the extent of harm to young children and the least

intrusive means to protect this group. Without a more fully developed record we cannot say how the injunction will ultimately be drawn. As this Court stated,

> It would be wholly inappropriate for us to attempt to render an opinion on the First Amendment issue when no specific plan is before us. A federal court does not sit to render a decision on hypothetical facts...

Wheeler v. Barrera, 417 U.S. at 427-27 (Blackmun, J.). Granting a writ of certiorari at this stage in the proceeding will place this Court in the position of issuing an advisory opinion on the abstact contours of the doctrines of prior restraint and "fighting words".

The holding in *Construction Laborers v. Curry*, 371 U.S. 542 (1962) does not compel jurisdiction in this case. In *Curry*, this Court held that the state court remand was a final judgment within the meaning of 28 U.S.C. § 1527 in part because the state's very act of asserting jurisdiction over a labor claim established jurisdiction. In such an instance, federal jurisdiction was appropriate, "if a refusal immediately to review the state-court decision might seriously erode federal policy"[10] such as the exclusive jurisdiction of the National Labor Relations Board. *Curry*, 371 U.S. at 548.

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[10] *Cox Broadcasting*, 420 U.S. at 482.

Finally, this Court should deny certiorari in view of the petitioners' compounded failure to accurately set forth the record and issues raised by the decision below. In addition to the mischaracterizations set forth in Part I, above, petitioners fail to mention in their Questions Presented, Statement of the Case, or argument that the Washington State Supreme Court remanded the content restriction on the very issue presented in the petition.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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